84-1326

Office-Supreme Court, U.S.
FILED
JAN 3 1985
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

PHILIP J. LAPLACA,
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert F. Simone, Esquire
Robinson Building, Suite 1500
42 South 15th Street
Philadelphia, PA 19102
(215) 563-7005
Attorney I.D. 13567

37 pp

QUESTIONS PRESENTED

1. Was there sufficient evidence presented by the United States against the Appellant, PHILIP J. LaPLACA, to support his conviction for conspiracy?

2. Did the trial court err in denying defendant's Motion to Suppress Evidence and to Dismiss the Indictment?

TABLE OF CONTENTS

Questions Presented..... i.

Index of Authorities..... iii.

Opinions Below..... iv.

Jurisdiction..... v.

Statutory Provision Involved..... vi.

Statement of the Case..... 1.

JReasons for Granting the Writ.....6.

Argument:

1. THERE WAS INSUFFICIENT EVIDENCE PRESENTED BY THE UNITED STATES AGAINST THE APPELLANT TO SUPPORT HIS CONVICTION FOR CONSPIRaCY..... 6.

2. THE LEARNED TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND TO DISMISS THE INDICTMENT BASED ON A VIOLATION OF THE

DEFENDANT'S SIXTH AMENDMENT RIGHtS..... 10.

Jugment and Probation/Commitment Order of the United States District Court for the Eastern District of Pennsylvania..... Appendix A

Judgment Order of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court..... Appendix B

Denial of Petition for Rehearing by the United States Third Circuit Court of Appeals..... Appendix C

TABLE OF AUTHORITIES

CASES:

United States v. Allen,
613 F.2d 1248(3rd Cir. 1980).... 7

United States v. Gardner,
475 F.2d 1273(9th Cir. 1973)....7,8

United States v. Levy,
577 F.2d 200(3rd Cir. 1978)..... 14

STATUTES

21 U.S.C. 841(a)(1)..... 6

21 U.S.C. 841(b)(1)(B)..... 6

21 U.S.C. 846..... 6

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PHILIP J. LAPLACA, the Petitioner, prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above case on November 7, 1984.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania, Criminal No. 83-196, was not reported.

The opinion of the Court of Appeals for the Third Circuit, No. 83-5870, was not reported either.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on October 9, 1984, and a Petition for Rehearing was denied on November 7, 1984. Copies of the said judgment and denial are attached to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 21 U.S.C. 841(a)(1) -

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture distribute, or dispense, a controlled substance."

2. 21 U.S.C. 841(b)(1)(B) -

"Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows: ... In the case of a controlled substance... if any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of

this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment."

3. 21 U.S.C. 846 - "Any person

who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

On or about June 13, 1983, search warrants were obtained for the person of the Petitioner by special agents of the Federal Drug Enforcement Agency (DEA) based upon information obtained from a confidential informant and a check of FBI records. On June 22, 1983, the Petitioner was arrested while driving his van, and was then taken back to his home where the search warrant was executed and where several items of contraband and paraphernalia were found. Special agent Gary O'Brien of the DEA testified that the Petitioner discarded white powder from his van shortly before being arrested. (N.T. 114, 115, 9/7/83). The appellant testified that nothing was discarded from his van before his arrest. (N.T. 15, 9/8/83). After the search

warrant of the Petitioner's house was executed, and several items of contraband and paraphernalia were found, the Petitioner was transported to the police station, a ride that took approximately 45 minutes. The Government's special agents testified that during that ride, the Petitioner made inculpatory remarks concerning his involvement in the cutting and distribution of methamphetamine, in cooperation with one Gary Johns. The Petitioner testified that during this ride, DEA special agent O'Brien asked the Petitioner about the involvement of his wife, his relationship with Gary Johns and one Jo Jo Childs, and the possibility of the appellant's cooperating with the government. These statements made by the Petitioner were the only ones connecting him with any conspiracy; no one else was arrested and

no one besides the Petitioner and the Government's special agents testified at trial. On approximately August 19, 1983, it was discovered that the Petitioner's wife, KAREN LaPLACA, had been providing information to the United States regarding her husband's activities both prior to and following his arrest. On approximately August 23, 1983, the Petitioner's attorney, DAVID A. RUHNKE, ESQUIRE, learned that Mrs. LaPlaca had been providing the Government with confidential information concerning defense tactics and strategies following the arrest of the Petitioner.

The Petitioner filed Motions to Suppress the statements that he allegedly made in custody while being taken to the police stattion on June 22, 1983. Those motions were denied on August 19, 1983. Trial began on

September 6, 1983, after the Petitioner's Motion to Dismiss the Indictment was denied. The Petitioner was subsequently convicted of conspiracy to distribute and possession with intent to distribute methamphetamines.

On November 14, 1983, the appellant was sentenced to a total of twelve (12) years imprisonment, with a special parole term of four (4) years. On December 5, 1983, the surrender date, the Petitioner failed to appear, was adjudged a fugitive, apprehended, charged with being a fugitive, and was sentenced to one (1) additional year of imprisonment.

The Petitioner contends that the Indictment in this case should have been dismissed because vital defense information was obtained by the Government after his Sixth Amendment

right to counsel had attached, and second, because there was insufficient evidence to convict the Petitioner of conspiracy.

REASONS FOR GRANTING WRIT

I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED BY THE UNITED STATES AGAINST THE PETITIONER TO SUPPORT HIS CONVICTION FOR CONSPIRACY.

The Petitioner contends that the Government failed to present evidence necessary to prove the most fundamental element in a conspiracy, an agreement between the members of the conspiracy. The appellant was convicted of violating 21 U.S.C. Sections 841(a)(1), (b)(1)(B), and 846, which require that there be some conspiring with "unknown others." The District Court even noted that the Government had a very weak case as to conspiracy. (N.T. 217, 9/7/83). The only real evidence of conspiracy presented in this case were statements

allegedly made by the Petitioner while being transported to the police station and an address book with the name Jo Jo in it.

In a conspiracy prosecution, the evidence is sufficient if, when taken in a light most favorable to the Government, it leads one to rationally conclude that one defendant did not act alone, and therefore conspired with a second person. United States v. Allen, 613 F.2d 1248 (3rd Cir. 1980). To show a "framework" of conspiracy is only an inferential beginning to a finding that the defendant is guilty of conspiracy, but is not enough to draw a firm conclusion of such activity; other more substantial evidence must be presented to supply more of a foundation to convict one of conspiring with "others unknown." United States v. Gardner,

475 F.2d 1273, 1278 (9th Cir. 1973).

In the instant case, the Government showed a "framework" for the alleged conspiracy, but nothing more than that. The Petitioner's alleged statements made to the police, which he maintained were misstated, and the papers seized from the Petitioner's van, are not substantial enough to show anything more than a "framework" for an alleged conspiracy. The government failed to show any significant connection between these papers and the alleged conspiracy. The government never even attempted to refute the Petitioner's testimony that these books or papers contained names and addresses related to his food distribution business. Therefore the Government has shown nothing more than the existence of a buyer and seller relationship through these books, and

that is well short of proving a conspiracy. Proof of the most basic element of conspiracy, an agreement, express or implied between the conspirators, is simply lacking in this case. There was no evidence of telephone conversations, no evidence of meetings or sales to informants or experts, and no proof as to how any of the other people named in the conversations were involved in this alleged conspiracy. Therefore, because the Government failed to use any of the traditional, circumstantially based methods for proving a conspiracy, it is clear that proof does not exist for a conviction. Hence, the Petitioner's conviction should be reversed or a new trial should be ordered.

II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE AND TO DISMISS THE INDICTMENT BASED UPON A VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHTS.

A. The trial court erred in denying the Petitioner's Motion to Suppress.

The Petitioner testified that after being arrested there was talk in front of him by Government agents that his wife could be arrested, and/or held responsible for the narcotics allegedly found in his home. In reality, the Petitioner's wife was Government informant number one, and it was later conceded that the agents told the Petitioner that his wife was in jeopardy in order to protect her confidential

status. (N.T. 63-64, 8/19/83).

The Petitioner testified that his being willing to talk to the Government agents was a direct result of his fear that his wife might somehow be involved in the matter. (N.T. 50-51, 8/19/83). Hence, it is entirely plausible to argue that the Government's implied threats and its ability to make good on those threats constituted the type of subtle coercion that leads to a finding that the Petitioner's waiver of his Miranda rights was not "knowing and valid." In other words, it was not the Petitioner's desire to speak to the Government agents that lead to his statements, but rather a fear that his wife would later be arrested or could later be arrested as a result of his failure to cooperate.

The trial court denied the

Petitioner's Motion to Suppress these statements based upon a finding that the questioning involved was not done in a terribly strong or subjective or threatening manner. (N.T. 66, 8/19/83). The court also accepted the Government's position that coercion was not possible since the wife was not arrested immediately. However, the wife still could have been arrested at a later date, and the Petitioner contends that the implied threats to his wife's legal safety were sufficient to render his waiver of Miranda rights to be involuntary. Therefore, any statements made by the Petitioner should be suppressed.

B. The trial court erred in failing to dismiss the indictment upon the discovery of a violation of the defendant's Sixth Amendment rights.

The Petitioner argues that the Indictment against him should have been dismissed when it was discovered that Government agents continued to receive confidential information involving defense strategy after the Petitioner was arrested and after the right to counsel had attached. Txe informant in this case, the Petitioner's wife, spent over seven and a half (7 1/2) hours on the telephone with an agent of the DEA during the period of a month and a half, with several of those calls lasting for nearly one hour. As a result the Petitioner argues that his Sixth Amendment right to counsel was violated by the Government's continuing to receive information from its informant, and that therefore the Indictment should have been dismissed.

In United States v. Levy, 577 F.2d 200 (3rd Cir. 1978) a confidential informant was privy to the attorney-client discussions. The Third Circuit Court of Appeals ordered the District Court to dismiss the indictment since confidential information had in fact been transmitted to DEA agents by the informant. Id., at 207. In so ordering, the Appellate Court in Levy held that when there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the Government, that the prejudice done to the defendant is so great as to violate the Sixth Amendment.

The holding in United States v. Levy is applicable to the instant case. Here, there has been an actual disclosure of defense strategy, a

disclosure that damaged the Petitioner's defense. At the hearing held on September 6, 1983, the Petitioner's wife, Karen Laplaca, testified that her relations with special DEA agent O'Brien were "friendly, close and open." (N.T. 30, 9/6/83). Mrs. Laplaca testified that during these discussions she and special agent O'Brien discussed the charges against her husband, the Petitioner herein, and they discussed his defense. The informant testified that during one such discussion, she disclosed to the Government agents several theories that the defendant planned to use in his defense, one of which being that the drugs were not his and the second being that the defendant would state that he was not at home when these narcotics were introduced to the premises. (N.T. 33, 9/6/83). Mrs.

Laplaca also testified that she gave special agent O'Brien the names of possible defense witnesses, and also discussed the motions that the defense might make. Other conversations occurred between Mrs. Laplaca and special agent O'Brien, thereby causing confidential defense information to be disclosed to the Government.

In the instant case, the Petitioner has "carried the burden" of showing that the United States permitted an informer to gather information from him in violation of his right to counsel. Based upon the record, the distinct possibility exists that confidential information was revealed to the Government. Therefore, it is the Petitioner's contention that the only appropriate remedy in this situation is to dismiss the Indictment.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NINO V. TINARAI, ESQ.
Attorney for Petitioner
1313 Race Street
Philadelphia, PA. 19107
(215) 569-2551

PROOF OF SERVICE

STATE OF PENNSYLVANIA:
SS.
COUNTY OF PHILADELPHIA:

MARK D. MUNGELLO, after being zduly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Solicitor General of
the United States
Department of Justice
Washington, D.C. 20530

and depositing the same in the United States mails at Philadelphia, Pennsylvania on this day of , 1985.

MARK D. MUNGELLO,
Affiant

Sworn to and subscribed before me this day of , 1985.

NOTARY PUBLIC

UNITED STATES DISTRICT COURT FOR

DISTRICT OF NEW JERSEY

APPENDIX A-1

UNITED STATES OF AMERICA

vs. CR 83-196

PHILIP J. LAPLACA, Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date: November 14, 1983, with counsel, ROBERT HOFFA, ESQUIRE.

PLEA: Not Guilty.

There being a finding/verdict of guilty. The defendant has been convicted as charged of the offense(s) of : knowingly did distribute a Schedule II Controlled Substance. (Count 1) Knowingly did possess with intent to distribute a Schedule II Controlled Substance. (Count 2)

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient

cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) years on Count 1; on Count 2 four (4) years, to run consecutively to the sentence imposed on Count 1. To be followed by a Special Parole Term of four (4) years. It is further ordered that execution of sentence be and is hereby stayed until December 5, 1983 at which time defendant shall surrender directly to U.S. Marshals.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at

any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General.

By the court,

_____
Dickinson R. Debevoise,
U.S. District Court Judge

DATED: November 15, 1983

APPENDIX A-3

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

vs. No. 83-5870

PHILIP J. LAPLACA,
Appellant

Appeal from the United States District Court for the District of New Jersey (Newark)
(D.C. Crim. No. 83-00196-01)
District Judge: Hon. Dickinson R. Debevoise

Argued September 11, 1984

Before: SEITZ, BECKER, and ROSENN, Circuit Judges.

JUDGMENT ORDER

The defendant, Philip J. LaPlace, was tried to a jury and convicted of possession with intent to distribute methamphetamine in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2, and conspiracy to distribute methamphetamine in violation of 21 U.S.C. Section 846.

The defendant timely appealed from sentence imposed and raises the following issues: (1) There was insufficient evidence presented by the United States against the appellant to support his conviction for conspiracy. (2) The trial court erred in denying the defendant's motion to suppress evidence and to dismiss the indictment based on the violation of the defendant's sixth amendment rights. (3) Wharton's rule bars the defendant's conviction for both conspiracy and the substantive offense for possession.

Upon review of the record and after consideration of all contentions raised by the appellant, his briefs, and oral argument, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

APPENDIX B-2

BY THE COURT:

MAX ROSEN, CIRCUIT JUDGE

DATED: October 9, 1984

APPENDIX B-3

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 83-5870

APPENDIX C-1

UNITED STATES OF AMERICA

v.

PHILIP J. LaPLACA, Appellant

(Crim. No. 83-00196 - D. of N.J. - Newark)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, CHIEF JUDGE, SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and ROSENN, CIRCUIT JUDGES.

The petition for rehearing filed by appellant, Philip J..LaPlaca, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

_____
Circuit Judge

Dated: November 7, 1984

APPENDIX C-2